U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

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PUBLIC COPY

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 24 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dis[redacted]

The petitio[redacted]ware development and computer consulting firm. It seeks to employ the beneficiary [redacted] in the United States as a software engineer pursuant to section 203(b)(2) of the Immigratio[redacted]ality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750, A[redacted]or Alien Employment Certification (ETA 750), approved by the Department of Labor ([redacted]mpanied the petition. Upon reviewing the petition, the director determined that the pe[redacted]d to establish ability to pay the proffered wages to the beneficiaries of the approved a[redacted]petitions including the instant beneficiary as of the priority date and to the present.

The record shows that the appeal is properly and timely filed, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In the instant case, the Form ETA 750 was accepted by the DOL on March 2, 2005. The proffered wage as stated on the Form ETA 750 is $82,000 per year. On the petition, the petitioner claims that it has been established in 1998, to have a gross annual income of $386,227 and 70 employees.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary claims to have worked for the petitioner since July 2003 and the petitioner submitted the beneficiary's W-2 forms for 2005 through 2007. The beneficiary's W-2 forms show that the petitioner paid the beneficiary $47,465.67 in 2005, $57,808.62 in 2006 and $61,255.04 in 2007. Therefore, the petitioner failed to establish its ability to pay the instant beneficiary the proffered wage as of the priority date through the examination of wages already paid to the beneficiary. The petitioner must demonstrate that it had sufficient net income or net current assets to pay the instant beneficiary the differences of $34534.33 in 2005, $24,191.38 in 2006 and $20,744.96 in 2007 respectively between wages actually paid to the beneficiary and the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). On appeal, counsel asserts that the petitioner's revenues and payroll indicated in the petitioner's letter and its certified public accountant (CPA)'s letter should be considered in determining the petitioner's ability to pay the proffered wage. Counsel's reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income.

The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The record contains the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation Income Tax Return, for 2005 and 2006. The tax returns show that the petitioner is structured as an S

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[2]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

corporation and its fiscal year is based on the calendar year. The petitioner's tax returns demonstrate its net income and net current assets for 2005 and 2006, as shown in the table below.

- In 2005, the Form 1120S stated net income[3] of $386,227 and net current assets of $42,272.
- In 2006, the Form 1120S stated net income of $645,273 and net current assets of ($193,638).

Therefore, for the years 2005 and 2006, the petitioner's tax returns appear that the petitioner had sufficient net income to pay the instant beneficiary the differences between wages actually paid to the instant beneficiary and the proffered wage.

In the additional brief dated December 8, 2008 counsel claimed that the petitioner was consolidated with several other entities to form [redacted] in 2007 and submitted the [redacted] Combined Financial Statements as of March 31, 2008. The financial statements show that [redacted] consists of five corporations including the petitioner [redacted], [redacted] However, counsel did not submit any corporate documentation to support his assertions regarding the establishment of the group. Corporations are classified as members of a controlled group if they are connected through certain stock ownership. All corporate members of a controlled group are treated as one single entity for tax purposes (i.e., only one set of graduated income tax brackets and respective tax rates applies to the group's total taxable income). Each member of the group can file its own tax return rather than the group filing one consolidated return. However, members of a controlled group often consolidate their financial statements and file a consolidated tax return. The controlled group of corporations is subject to limitations on tax benefits to ensure the benefits of the group do not amount to more than those to which one single corporation would be entitled. The record does not contain any documentary evidence showing that [redacted] Group is responsible for all debts and responsibilities of all the members of the group. Counsel did not submit the petitioner's tax return for the same period indicating it is a member of that controlled corporate group by marking a box on the tax computation schedule of the income tax return. Therefore, this office cannot accept and consider the group's financial figures in determining the petitioner's ability to pay the proffered wage. The financial statements are audited and contain figures for the petitioner, and therefore, we will consider the petitioner's net income and net current assets in this matter.

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[3] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2005) or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed on September 13, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

The [redacted] Combined Financial Statements as of March 31, 2008 show that the petitioner had net income of $3,327,393 and net current assets of $680,156 as of March 31, 2008. Counsel claims that these figures reflect the petitioner's net income for 2007 and the first quarter of 2008, and net current assets as of the end of the first quarter of 2008. Counsel did not submit the petitioner's tax return, annual report or audited financial statements for the calendar year of 2007 and did not explain why the petitioner's tax return for 2007 or the group's consolidated tax return n for 2007 was not submitted with the additional brief despite either of them should be available at the time when counsel submitted his additional brief in December 2008. Without further documentation, the AAO cannot determine how much net income and net current assets the petitioner had exactly at the end of 2007. However, with such a figure for the net income, the petitioner appears to have sufficient net income to pay the instant beneficiary the difference between wages actually paid to the instant beneficiary and the proffered wage.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions or approved petitions, including I-129 nonimmigrant petitions.

USCIS records show that the petitioner filed 39 additional I-140 immigrant petitions and among them, 29 immigrant petitions were approved by USCIS for which the petitioner was obligated to pay the beneficiaries the proffered wages in the relevant years in this matter, i.e., the petitioner was responsible to pay 27 proffered wages in 2005, 26 in 2006, 24 in 2007 and 16 in 2008[4] as H-1B employees in addition to the instant beneficiary.

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[4] USCIS records show that the 29 approved immigrant petitions related to the ability to pay the proffered wage in this matter are as follows:

-- [redacted] filed for [redacted] on August 9, 2004 with the priority date of September 10, 2002, and approved on February 14, 2005. The beneficiary was adjusted to lawful permanent resident status on December 6, 2006.

-- [redacted] filed for [redacted] on August 10, 2004 with the priority date of October 9, 2002, and approved on February 3, 2005. The beneficiary was adjusted to lawful permanent resident status on April 12, 2010.

-- [redacted] filed for [redacted] on August 13, 2004 with the priority date of August 29, 2002, and approved on August 25, 2004. The beneficiary's I-485 adjustment of status application was pending with USCIS as of April 6, 2009.

-- [redacted] filed for [redacted] on August 17, 2004 with the priority date of August 29, 2002, and approved on October 14, 2004. The beneficiary's I-485 adjustment of status application was pending with USCIS as of October 19, 2007.

-- [redacted] filed for [redacted] on September 20, 2004 with the priority date of April 30, 2001, and approved on November 5, 2004. The beneficiary was adjusted to lawful permanent resident

status on April 5, 2005.

-- [redacted] filed for [redacted] on December 14, 2004 with the priority date of October 1, 2002, and approved on March 7, 2005. The beneficiary was adjusted to lawful permanent resident status on April 28, 2005.

-- [redacted] filed for [redacted] on January 14, 2005 with the priority date of December 27, 2001, and approved on February 28, 2005. The beneficiary was adjusted to lawful permanent resident status on August 20, 2007.

-- [redacted] filed for [redacted] on January 18, 2005 with the priority date of March 6, 2002, and approved on February 23, 2005. The beneficiary's I-485 adjustment of status application was pending with USCIS as of September 11, 2009.

-- [redacted] filed for [redacted] on March 25, 2005 with the priority date of November 4, 2002, and approved on September 7, 2005. The beneficiary was adjusted to lawful permanent resident status on September 13, 2005.

-- [redacted] filed for [redacted] on July 14, 2005 with the priority date of February 25, 2002, and approved on November 8, 2005. The beneficiary's I-485 adjustment of status application was pending with USCIS as of November 14, 2007.

-- [redacted] filed for [redacted] on October 4, 2006 with the priority date of September 23, 2004, and approved on October 20, 2006.

-- [redacted] filed for [redacted] on November 6, 2006 with the priority date of July 28, 2004, and approved on February 15, 2008.

-- [redacted] filed for [redacted] on November 24, 2006 with the priority date of July 12, 2004, and approved on October 17, 2007.

-- [redacted] filed for [redacted] on January 8, 2007 with the priority date of March 31, 2006, and approved on August 3, 2007.

-- [redacted] filed for [redacted] on January 5, 2007 with the priority date of September 12, 2006, and approved on December 19, 2007.

-- [redacted] filed for [redacted] on April 9, 2007 with the priority date of October 29, 2001, and approved on May 9, 2007.

-- [redacted] filed for [redacted] on May 2, 2007 with the priority date of August 9, 2004, and approved on February 4, 2009.

-- [redacted] filed for [redacted] on May 21, 2007 with the priority date of March 2, 2005, and approved on October 16, 2007.

-- [redacted] filed for [redacted] on July 7, 2007 with the priority date of March 2, 2005, and approved on April 28, 2009.

-- [redacted] filed for [redacted] on July 7, 2007 with the priority date of March 24, 2005, and approved on January 19, 2008.

-- [redacted] filed for [redacted] on July 26, 2007 with the priority date of March 25, 2005, and approved on May 27, 2008.

-- [redacted] filed for [redacted] on July 27, 2007 with the priority date of March 24, 2005, and approved on August 19, 2008.

-- [redacted] filed for [redacted] on September 6, 2007 with the priority date of March 24, 2005, and approved on October 28, 2008.

-- [redacted] filed for [redacted] on September 17, 2007 with the priority date of March 24,

On appeal, counsel provided information on the immigrant petitions filed by the petitioner in recent years, USCIS receipt numbers, filing dates, priority dates, proffered wages, and wages paid in 2005 through 2007 and argued that the petitioner paid partial proffered wages and had sufficient net income or net current assets to pay the differences between wages actually paid to the beneficiaries and the proffered wages in 2005 through 2007.

As previously noted, the petitioner was responsible to pay 27 proffered wages in 2005 because these petitions were with a priority date in or before 2005 and had not been approved or the beneficiaries had not been adjusted to lawful permanent resident status before 2005. It is the petitioner's responsibility to pay the proffered wage or establish its ability to pay the proffered wage to each beneficiary from the year of the priority date until the beneficiary obtains lawful permanent resident status. The total proffered wages for those additional beneficiaries the petitioner was responsible to pay were $2,088,000.[5] The list provided by counsel on appeal reveals that petitioner only paid two beneficiaries a partial proffered wage of $34,166.60 and $65,633.70 respectively, totaling $99,800.30. However, the 2005 W-2 forms for the petitioner's employees in the record show that the petitioner paid one full proffered wage ($66,445.26 out of the proffered wage $53,000), and additional 16 partial proffered wages of $756,459.90[6], and therefore, the petitioner must demonstrate that it had sufficient net income

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2005, and approved on September 30, 2008.
-- [redacted] filed for [redacted] on July 14, 2007 with the priority date of March 26, 2005, and approved on March 7, 2008.
-- [redacted] filed for [redacted] on July 14, 2007 with the priority date of March 26, 2005, and approved on April 21, 2008.
-- [redacted] filed for [redacted] on July 14, 2007 with the priority date of March 25, 2005, and approved on August 18, 2008.
-- [redacted] filed for [redacted] on July 14, 2007 with the priority date of March 26, 2005, and approved on February 26, 2008.
-- [redacted] filed for [redacted] on October 1, 2007 with the priority date of March 24, 2005, and approved on December 30, 2008.

[5] Counsel provides information for the proffered wages offered to 19 beneficiaries which amounts a total of $1,468,000. For those counsel did not provide proffered wage information, this office adopts the average figure ($77,500 per year) of those 19 proffered wages and the proffered wage for the instant beneficiary as the proffered wage and calculates the total proffered wages of $620,000 for the other nine beneficiaries without proffered wage information provided.

[6] While counsel claims differently, the AAO relies on W-2 forms as evidence to demonstrate that the petitioner paid the beneficiaries full or partial proffered wages. In the instant case, the W-2 forms in the record show that the petitioner paid [redacted] $56,678.76, [redacted] $50,587.50, [redacted] $66,445.26, [redacted] $34,166.60, [redacted] $39,375.00, [redacted] $50,410.52, [redacted] $40,585.44, [redacted] $53,772.04, [redacted] $38,826.44, [redacted] $44,724.08, [redacted] $46,808.03, [redacted] $50,803.90, [redacted] $55,544.03, [redacted] $44,013.20, [redacted] $49,311.41, [redacted] $42,466.78, [redacted] $53,110.30, and [redacted] $65633.70.

or net current assets to pay the difference of $1,278,540.10 between wages paid to the beneficiaries and the proffered wages before it establish its ability to pay the difference between wages actually paid to the instant beneficiary and his proffered wage in 2005.

As previously discussed, the petitioner had net income of $386,227 and net current assets of $42,272 in 2005. The petitioner's net income or net current assets in 2005 were insufficient to pay the proffered wages and the differences between wages actually paid to the beneficiaries and the proffered wages of $1,278,540.10 for those 27 additional beneficiaries of the approved petitions before establishing its ability to pay the proffered wage to the instant beneficiary. Therefore, the petitioner failed to establish ability to pay the proffered wages to the approved beneficiaries in 2005 and also failed to establish ability to pay the instant beneficiary the proffered wage in the year of the priority date in the instant case.

The petitioner was responsible to pay 26 proffered wages in 2006. The total proffered wages for those beneficiaries the petitioner was responsible to pay was $1,995,088. The 2006 W-2 forms in the record show that the petitioner paid one full proffered wage of $84,000 and five partial proffered wages of $282,815.85.[7] Therefore, the petitioner must demonstrate that it had sufficient net income or net current assets to pay the difference of $1,628,272.15 between wages paid to the beneficiaries and the proffered wages before it establish its ability to pay the difference between wages actually paid to the instant beneficiary and his proffered wage in 2006.

The petitioner's tax return indicates that it had net income of $645,273 and net current assets of ($193,638) in 2006. The petitioner's net income or net current assets in 2006 were insufficient to pay the proffered wages and the differences between wages actually paid to the beneficiaries and the proffered wages of $1,628,272.15 for those 26 additional beneficiaries of the approved petitions before establishing its ability to pay the proffered wage to the instant beneficiary. Therefore, the petitioner failed to establish ability to pay the proffered wages to the approved beneficiaries in 2006 and also failed to establish ability to pay the instant beneficiary the proffered wage in the year of the priority date in the instant case.

Counsel prorated the proffered wages for the portion of the year that occurred after the priority date when it calculated the differences between wages actually paid to the beneficiaries of the approved petitions. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

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[7] The petitioner paid [redacted] $44,442.50, [redacted] $76.020.81, [redacted] $48,996.25, [redacted] $57,490.58, [redacted] $55,865.71, and [redacted] $85,573.41.

The record contains the petitioner's bank statements as evidence of the ability to pay the proffered wages. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

The record contains the audited [redacted] Combined Financial Statements as of March 31, 2008 show that the petitioner had net income of $3,327,393 and net current assets of $680,156 as of March 31, 2008. Without further documentation, the AAO cannot determine how much net income and net current assets the petitioner had exactly at the end of 2007. With such significant net income, the AAO may assume that the petitioner had sufficient net income to pay the instant beneficiary the difference between wages actually paid to the instant beneficiary and the proffered wage in 2007. However, this office cannot determine whether the petitioner's net income in 2007 was sufficient to pay 24 proffered wages the petitioner was responsible for that year. The petitioner failed to establish its ability to pay all proffered wages in 2007 because it failed to submit its regulatory-prescribed financial documents for this year. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay all beneficiaries of the approved petitions and the instant beneficiary the proffered wages as of the priority date through an examination of wages paid to the beneficiary, and its net income or net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in

California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner failed to establish its ability to pay all proffered wages for all relevant years. In addition, given the record as a whole, the petitioner's history of filing immigrant and nonimmigrant petitions, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wages.

Beyond the director's decision, the AAO has identified additional grounds of ineligibility. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

The record shows that the beneficiary possesses a bachelor of commerce degree from [redacted] University in 1992, a post graduate diploma in computer application from [redacted] Institute of Information Technology in 1994 and a master of business administration (MBA) degree from [redacted] University in 1997. Thus, the issues are whether each degree or diploma is on its own a

single source foreign equivalent to a U.S. master's degree, if not, whether each of them is on its own a single source foreign equivalent to a U.S. baccalaureate degree plus five years of experience. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Eligibility for the Classification Sought

As noted above, the Form ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the

alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. In the instant case, the transcripts for the beneficiary's bachelor of commerce degree study show that the beneficiary obtained a three-year bachelor of commerce degree from Osmania University in India, and therefore, the beneficiary's three-year bachelor of commerce degree is not the foreign equivalent degree to a U.S. baccalaureate degree.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, www.accrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://accraoedge.accrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE provides a great deal of information about the educational system in India. It discusses both Post Secondary Diplomas, for which the entrance requirement is competition of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts that a Postgraduate Diploma following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provides:

> Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

In this case, the record does not contain evidence showing that [redacted] Institute of Information Technology is an accredited university or institution approved by the AICTE in India and that institute is authorized to issue a bachelor's degree. Therefore, the post graduate diploma from [redacted] Institute of Information Technology is not a foreign degree equivalent to a U.S. bachelor's degree.

EDGE confirms that a master of arts, commerce, science awarded upon completion of two years of study beyond the two- or three-year bachelor's degree in India is not the foreign equivalent degree to a U.S. master's degree. The beneficiary's two-year MBA degree from [redacted] University beyond the three-year bachelor's degree in India is not the foreign equivalent degree to a U.S. master's degree.

Counsel submitted an academic equivalency evaluation dated December 18, 2007 from [redacted] stating that the beneficiary's MBA degree from [redacted] University in India is the equivalent of an MBA degree from an accredited university in the United States. However, USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

EDGE also confirms that a master of arts, commerce, science awarded upon completion of two years of study beyond the two- or three-year bachelor's degree in India represents attainment of a level of education comparable to a bachelor's degree in the United States. In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). Accordingly, the beneficiary's MBA degree from [redacted] University represents attainment of a level of education comparable to a bachelor's degree in business administration in the United States.

Therefore, the beneficiary has a "United States baccalaureate degree or a foreign equivalent degree," and thus, meet the minimum level of education required for the equivalent of an advanced degree, namely a Bachelor's degree, for preference visa classification under section 203(b)(2) of the Act. However, to qualify for the second preference classification, the beneficiary must establish that he possessed at least five years of progressive experience in the specialty after his bachelor's equivalent degree but prior to the priority date.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the

> domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications are found on Form ETA 750A, Item 14 which requires a master's degree or equivalent in computer science, computer information systems (CIS), management information systems (MIS), engineering, business administration or mathematics. The item 14 also requires two years of experience in the job offered or in the related occupation of programmer, application /consultant or any experience providing skills in described duties. Item 15 indicates that the employer will accept a Bachelors or equivalent in Computer Science, CIS/MIS, engineering, business administration, math or related field plus five years of progressive experience in lieu of Masters or equivalent and two (2) years of experience. As discussed above, the beneficiary does not possess a foreign degree equivalent to a U.S. master's degree, but a foreign degree equivalent to a U.S. bachelor's degree. Therefore, the petitioner must demonstrate that the beneficiary possessed five years of progressive experience in the specialty after his bachelor's equivalent degree and two additional years of experience in the job offered or related occupation described on the Form ETA 750, total seven years of experience prior to the priority date in this matter.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C.

1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the additional brief dated December 8, 2008, counsel claimed that the beneficiary had 73 months experience, which is more than the required five years experience in the position offered – or related occupation - prior to March 2, 2005. Counsel's assertion is misplaced. As discussed above, the Form ETA 750 clearly requires a master's degree and two years of experience in the job offered or related occupation. However, the employer also expresses its intent to accept a bachelor's degree plus five years of experience in lieu of the master's degree. While the employer provides an alternate combination of a bachelor's degree and five years of experience for the master's degree, it does not indicate that the five years of experience will replace the two years of experience requirement in addition to the master's degree. Instead, Item 14 clearly requires two years of experience in addition to the educational requirements and Item 15 also clearly requires two years of experience in addition to the alternate combination of a bachelor's degree and five years of experience. Therefore, the petitioner must establish that the beneficiary possessed seven years (84 months) of experience prior to the priority date. The beneficiary's alleged 73 months of experience does not meet the requirements for the proffered position and therefore, the petition cannot be approved.

In addition, the regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The petitioner must establish the beneficiary's requisite experience with evidence described at 8 C.F.R. § 204.5(g)(1) above. The record contains letters from the beneficiary's four former employers as evidence to establish the beneficiary's qualifying experience. Counsel claimed that the beneficiary worked for [redacted] in India as a programmer analyst from June 1997 to March 2000. For this employment, counsel submitted two letters from the company. One letter is dated March 6, 2000, on the company's letterhead, and signed by [redacted] as Accounts & Administration Officer. It certifies that the beneficiary worked in that company as a programmer analyst from June 4, 1997 to March 3, 2000 and includes a brief description of what he performed. With the December 8, 2008 additional brief, counsel submitted another letter from this employer. The second letter is dated 03-04-2000, on the company's different letterhead, and signed by [redacted] as HR Manager of the company. The letter certifies that the beneficiary worked 40 hours weekly in the company as Computer Programmer from June 1997 to March 2000 and

includes a more specific description of the duties the beneficiary performed during this period. Counsel did not explain why the company issued two different experience letters from two different officers. The letterhead the second letter used appears computer created and with different format from the one for the first letter. Counsel did not explain why the two letters written within a week or a month used so different letterhead of the company. The record does not contain any independent objective evidence to establish the company's establishment and operation, the writers' positions with the company and the beneficiary's employment and payment with the company. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record does not contain any independent objective evidence to resolve the inconsistency in this case. Thus, the AAO cannot accept and consider these two letters from Quest Syscon as evidence of the beneficiary's qualifications. Therefore, the petitioner failed to establish the beneficiary's alleged 34 months of experience from Quest Syscon with regulatory-prescribed evidence required by the regulation at 8 C.F.R. § 204.5(g)(1).

The second letter is dated June 8, 2001 and signed by [redacted], Senior Vice President, [redacted], verifying that the company employed the beneficiary as a consultant during the period December 21, 2000 to June 8, 2001 with a brief description of the duties he performed during this period. However, this letter does not include the address of the writer and company as required by the regulation. While it appears on the company's letterhead, it does not provide the company's address, and thus, it does not meet the requirements set forth at 8 C.F.R. § 204.5(g)(1). Although the letter indicates that the beneficiary was contracted to his company through an agency from May 2000 to November 2000, this office cannot accept this letter as regulatory-prescribed evidence for the six months (from May 2000 to November 2000) of experience as a contractor because Finesse Alliance was not the beneficiary's employer during this time period. Further, we cannot credit the entire five and a half months to the qualifying experience because the letter does not confirm the beneficiary's full-time employment. Therefore, the AAO cannot accept and consider this letter as regulatory-prescribed evidence, and thus, the petitioner failed to establish the beneficiary's alleged 13 months of experience from Finesse Alliance.

The third letter is dated June 12, 2001 and signed by [redacted] as Manager of [redacted] in Singapore, certifying that the beneficiary worked with the company as a Software Consultant from June 2001 to June 2002 with a description of the duties the beneficiary performed in that organization during this period. This letter appears to meet the requirements set forth at 8 C.F.R. § 204.5(g)(1), this office cannot credit the entire one year of experience to the qualifying experience because the letter does not confirm the beneficiary's full-time employment.

The fourth letter is dated April 1, 2003 and signed by [redacted], Director of [redacted] in Singapore, confirming that the beneficiary worked with the company as a full-time Software Application Consultant from February 1, 2002 to March 31, 2003 with a description of the duties he performed. The AAO finds that this fourth letter from [redacted] meets the requirements set forth at 8 C.F.R. § 204.5(g)(1). However, this letter also states that the beneficiary was initially

contracted through [redacted] from February to June 14th 2002 before becoming a full time employee. According to the letter, the beneficiary actually worked as a full-time employee for [redacted] from June 15, 2002 to March 31, 2003 and as a contractor from February 2002 to June 14, 2002. Therefore, this letter only verifies the beneficiary's full-time experience as a software application consultant for nine months and a half from June 15, 2002 to March 31, 2003. For the period worked a contractor from February 2002 to June 14, 2002, [redacted] is not in the position to verify this experience because it was not the beneficiary's employer then. Besides, as discussed above, [redacted] provided its employment verification letter for this period as the beneficiary's real employer.

The record does not contain any other evidence to establish the beneficiary's requisite experience. Therefore, the petitioner has not established with regulatory-prescribed evidence that the beneficiary possessed five years of progressive experience in the specialty and two years of experience in the job offered or related occupation after the beneficiary's bachelor equivalent degree but prior to the priority date as required by the regulations and underlying labor certification.

To qualify for the second preference classification in this case, the beneficiary must establish that he possessed a U.S. bachelor's degree or a foreign equivalent degree and at least five years of progressive experience in the specialty after his bachelor's degree but prior to the priority date as the regulation requires in lieu of the master's degree required on the Form ETA 750. In addition, the underlying labor certification specifically requires two additional years of experience in the job offered or related occupation. As discussed above, the petitioner failed to submit regulatory-prescribed evidence to establish that the beneficiary possessed five years of progressive experience in the specialty and two additional years of experience in the job offered or related occupation prior to the priority date. Therefore, the beneficiary does not meet the job requirements on the labor certification. For the reason mentioned above, the petition may not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.